
Introduction

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Legal malpractice claims occasionally grab headlines, but are more often quietly asserted and resolved, sometimes without a lawsuit and often through negotiation, with or without an insurer involved. While hard data is hard to come by, the number of legal malpractice claims made on an annual basis appears to be rising, along with the dollar amount of such claims. Whether a lawyer is involved in litigating legal malpractice actions or merely wants to understand more about these matters, this book is intended to serve as a resource to how the law varies state by state.

The book includes a chapter devoted to the law of each state, written by lawyers who practice in that particular state. The chapters follow a standard format, allowing the reader to easily search for comparable law in other states.

The chapters detail the applicable law of legal malpractice as follows.

ELEMENTS OF THE CLAIM

While different states impose varying requirements, the basic elements of a legal malpractice claim are essentially the same across the country. A legal malpractice claim can sound in contract or tort or both—except in Alabama, where the only available cause of action is a statutory one. The most common articulation of the elements of the claim is a breach of the standard of care that proximately causes damage. That simple formulation encompasses critical issues that often form the crux of litigation. These include: a) who has standing to sue; b) what constitutes a breach of the standard of care; c) with what degree of certainty must causation be proven; d) how are damages measured; and e) when must a claim be brought, or, rather, when is a claim time-barred. In most states, lawyers face liability for other types of claims as well: fraud, breach of fiduciary duty, negligent misrepresentation, deceptive trade practices, malicious prosecution, aiding and abetting, and conspiracy.

STANDING

Most states require privity of contract as a threshold to being able to sue a lawyer for legal malpractice. That is, non clients generally cannot sue a lawyer for negligence. The exceptions to that rule are legion and, to some observers, continue to expand. And, of course, each state seems to apply these exceptions differently. Generally, however, the extent to which lawyers owe duties to nonclients depends upon the degree to which the nonclients were intended beneficiaries of the lawyer's services, or foreseeably relied upon the lawyer in some way.

STANDARD OF CARE

The standard of care is usually determined by expert testimony, but states differ on the specific formulation of the standard. For example, some states define the standard based on regional or local terms—the standard of care that lawyers in the area normally employ in a similar case. Other states look to a national standard. Moreover, some states recognize the specialization of lawyers and hold those specialists to a higher standard in their area of specialty, while other states see all lawyers as generalists.

CAUSATION

The most common articulation of the test for proving that a lawyer's negligence caused damages is the "but for" test. That is, the plaintiff must prove that but for the defendant's claimed negligence, the plaintiff would not have suffered any damages.

In legal malpractice cases arising from litigation matters, many jurisdictions require the plaintiff to retry the underlying case in what is commonly called the "case within a case" procedure. Similarly, certain jurisdictions require the plaintiff to prove that she could have collected those damages in the underlying case. Where a plaintiff claims that a lawyer mishandled a criminal matter, in many states—such as Arizona, California, and Kentucky—the plaintiff cannot prove causation unless she was determined to have been innocent. Otherwise, any negligence by the lawyer will not be deemed to have caused any damages.

In the civil context, an issue that is often litigated is the extent to which a legal malpractice plaintiff's settlement of the underlying matter affects causation in the legal malpractice case. In certain jurisdictions, a settlement will make it more difficult for the plaintiff to meet the burden of proof on causation.

DAMAGES

Monetary damages are the standard remedy for legal malpractice. In almost every state, a legal malpractice plaintiff may not recover damages for any emotional distress caused by the lawyer's actions. One exception is Utah, where a plaintiff may recover such damages as long as the mental anguish is a natural consequence of the wrong. Some states allow a defendant to offset damages by the amount that the plaintiff would have had to pay the lawyer as a contingent fee in the underlying case, but many states do not allow such offsets.

DEFENSES

An important affirmative defense to a legal malpractice claim is that the claim is barred by the limitations period, but the application of this defense is varied. In many states, the limitations period is one year from the date of the attorney's negligence. Other states, such as Georgia, apply a different limitations period depending on whether the malpractice claim is pled in tort or contract. The rules of accrual and tolling also vary widely from state to state. Some states apply the so-called "continuing representation doctrine" under which the claim does not accrue, or the limitations period is tolled, until the attorney's representation of the client is concluded. Similarly, the limitations period may be tolled until the plaintiff discovers or should have discovered the negligence. Certain states, including California, also toll the limitations period until the plaintiff suffers actual injury as a result of the alleged negligence, while other states hold that nominal damages are sufficient to trigger the limitations period. Fraud also commonly tolls the statute of limitations,

but New York law, for example, does not permit mere concealment of an attorney's wrongdoing to lengthen the limitations period for legal malpractice claims.

Some states allow a defendant to raise a defense of comparative fault or contributory negligence on the part of the plaintiff or a third party.

The doctrine of judgmental immunity, which is available in most states, is a defense that is unique to legal malpractice claims. That doctrine, as commonly articulated, provides that where an attorney has reasonably considered an issue of unsettled law, the attorney shall not be liable in the event the court decides the issue adversely to the attorney's client. The doctrine is applied in varying ways in different jurisdictions. For example, in some states, judgmental immunity is not a separate defense, but is considered in the analysis of whether the attorney breached the standard of care in the first place.

OTHER ISSUES

It is important to know and understand the specific requirements that may apply to legal malpractice complaints in particular jurisdictions. For example, certain states require plaintiffs to verify their complaints, or submit an expert's report with the initial complaint.

In every state, expert testimony is admissible to prove a breach of the standard of care, although such testimony is not required in every state or for every claim of legal malpractice. Moreover, states differ on whether expert testimony is permitted on the issue of causation, especially in the "case within a case" context, because such testimony may invade the province of the jury.

ALTERNATIVE CAUSES OF ACTION

While legal malpractice remains the most common claim alleged against attorneys by their former clients, other causes of action may be available. Fraud, breach of fiduciary duty, breach of contract, and negligent misrepresentation may be available under certain circumstances. Malicious prosecution, aiding and abetting and conspiracy claims are third party claims available in certain jurisdictions, although not in others.

We have enjoyed working on this project, and hope that the book serves as a resource for lawyers across the country. We thank all of the authors who contributed their hard work to this effort, and also applaud the work of the members of the Professional Liability Litigation committee who made this book possible, including Paul Koenig, James Brown, and so many others.